78-218

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

FILED
AUG 1 19
MICHAEL RODAK, JR.

No. 78-218

INDIANA WAR MEMORIALS COMMISSION,

Petitioner,

vs.

INDIANA CIVIL LIBERTIES UNION, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

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OCTOBER TERM, 1972

No.

INDIANA WAR MEMORIALS COMMISSION,

Petitioner,

vs.

INDIANA CIVIL LIBERTIES UNION, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

Petitioner, Indiana War Memorials Commission, respectfully prays that this Court issue a writ of certiorari to review and reverse the judgment of the Supreme Court of Indiana, entered on May 2, 1973, in cause number 470 S 89 entitled Indiana Civil Liberties Union, Inc., v. Indiana War Memorials Commission which denied your petitioner's (appellee below) Petition for Rehearing of said Court's previous opinion issued on February 1, 1973, which reversed the decision of the Marion County Superior Court No. 7.

OPINION BELOW

The opinion of the Supreme Court of Indiana ich reversed the trial court is offically ported at 291 N.E. 2d 888 (1973). A copy the Order of that Court denying petitioner's etition for Rehearing" has been appended as pendix A.

JURISDICTION

The jurisdiction of this Court is invoked rsuant to 28 U.S.C. §1257 to review the cision of the Supreme Court of Indiana which has tempted to preclude such review by failing to nsider the federal aspects of the questions it cided on basically identical state grounds.

QUESTIONS PRESENTED FOR REVIEW

The Questions presented here are:

(A) Whether or not the Supreme Court of Indiana n effectively preclude review of one of its cisions by failing to consider the federal nstitutionality of questions raised to it on peal, and instead deciding said questions on bstantially similar state constitutional grounds;

(B) Whether or not the Supreme Court of Indiana was in error in determining that the petitioner was arbitrary in denying respondent the use of the auditorium so as to amount to a denial of equal protection of Art. 1, §23 of the Constitution of Indiana;

(C) Whether or not the purpose of the meeting of the respondent and the purpose of the organization qualify for the use of the auditorium under the petitioner's rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, §23 of the Constitution of the State of Indiana provides:

> "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Burns' Ind. Stat. Ann. §59-1508 provides in part:

> "Said commission is hereby authorized and directed to erect and maintain. . . a suitable structure or structures to commemorate the valor and sacrifice of the soldiers, sailors and marines of the United States, and of all others who rendered faithful, loyal, heroic and self-sacrificing service, at home and overseas, in the great World War, and to provide therein a place or places of meeting and headquarters for organizations of soldiers,

Sailors and marines or any other patriotic societies or associations, and for the keeping of records, archives, documents, flags, mementoes and relics and for other public meetings and other public purposes, in order to inculcate a true understanding and appreciation of the duties, benefits and privileges of American citizenship, inspire patriotism and respect for the law, to the end that peace may prevail, good will be promoted, justice be administered and established, public order maintained, and liberty and freedom under the law perpetuated."

Burns' Ind. Stat. Ann. §59-1528 provides:

"Such commission shall have the power to grant the use, for public purposes, of any structures, or any part thereof, erected by them under the provisions of this act without rent or charge, or for only a nominal rental, to any organizations of soldiers, sailors and marines and others, as a place or places for their meeting and headquarters, and for the keeping of records, archives, documents, flags, mementoes and relics, and for other public meetings and other public purposes not inconsistent with the purpose of this act, for such time and upon such terms and conditions as said commission may determine." (Emphasis supplied.)

Burns' Ind. Ann. Rules and Regs. (59-1508)-1 (War Memorials Commission Rule One) provides:

"The auditorium and meeting rooms may be used, subject to the limitations of the maintenance fund appropriated to the Indiana war memorials commission, for the following purposes:

(a) Meetings of organizations of veterans or members of the armed forces of the United States. Such meetings shall have preference in the use of the auditorium and other facilities of the memorial building.

(b) Meetings of organizations or persons whose programs have patriotic, civic, educational,

historical, charitable, agricultural, scientific, or cultural purposes.

(c) Meetings for purposes of general public interest which conform to law and these rules."

STATEMENT OF THE CASE

The Indiana Civil Liberties Union, respondent herein, hereafter ICLU) applied for use of the Indiana War emorial auditorium on August 2, 1967. This application as denied on September 14, 1967 by the Indiana War emorials Commission, petitioner herein (hereafter ommission) on the grounds that the ICLU's purpose was ot consistent with the intent and purpose of the use f the Memorial as provided in the statutes.

The ICLU requested a hearing by the Commission and aid hearing resulted in the denial of the application. n January 8, 1970, the Marion County Superior Court, o. 7, affirmed the denial of the application by the ommission, and specifically found that there was no enial of respondents:

"constitutional rights of freedom of speech, freedom of assembly and to equal protection and privileges as provided by the First and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 23, of the Constitution of the State of Indiana."

The ICLU then appealed to the Indiana Supreme Court contending that the denial of its application for the use of the auditorium interfered with rights protected by the First and Fourteenth Amendments to the United States Constitution and by Article I, Sections 9 and 23 of the Indiana Constitution.

In its opinion the Supreme Court of Indiana acknowledged that the law permits "public use of the War Memorial as long as that use is not inconsistent with the purpose for which the Memorial was established." 291 N.E. 2d at 889. However, the Indiana Supreme Court went on to hold that the Commission had been arbitrary in denying the ICLU use of the auditorium and that such action was a denial of equal protection under Art. 1 §23 of the Indiana Constitution. The Court, in its opinion, ignored all federal questions raised in the briefs.

The cause was then reversed and remanded to the Marion County Superior Court, No. 7, for further proceedings not inconsistent with the opinion of the Indiana Supreme Court. In its "Entry for June 29, 1973" the Marion County Superior Court, No. 7, ordered that the Commission allow the ICLU to hold a meeting in the auditorium on October 13, 1973.

REASONS FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of Indiana has attempted to preclude review of its decision in the cause giving rise to this Petition by failing to rule upon the Federal constitutional questions presented on appeal from the trial court. The trial court specifically found that there were no denials of federally protected rights, and that the ICLU did not show that the decision of the Commission was not supported by the facts or was arbitrary and capricious.

On appeal to the Supreme Court of Indiana the ICLU stated at page 16 of its Brief that its basic position on appeal was that:

> " . . . the action of the Commission in denying the application of the ICLU to use the War Memorial facility violates the rights of ICLU and its members under the First and Fourteenth Amendments to the Constitution of the United States, and under the Indiana Constitution, Article I, Sections 9 and 23. These provisions provide for freedom of speech and freedom of assembly, as well as equal protection under the laws."

The ICLU further stated that a second basis for appeal was that the findings of the Commission were not supported by the evidence. However, the respondent indicated that it did not seek reversal on this

"narrow ground."

The Supreme Court of Indiana totally ignored the federal questions raised by the ICLU as its "basic position" on appeal, and by so ignoring those questions attempted to preclude any review of its decision by this court even though that decision might be devoid of substance. In its brief to the Supreme Court of Indiana the ICLU thought that these federal questions were so important that of the twenty-three pages of argument in support of its "basic position," twenty of those pages involve those questions. However the Supreme Court of Indiana sought to disregard all of those questions and made a decision that ignored the merits of the issue but "resolved" the matter on state law.

In its opinion the Supreme Court of Indiana determined that the Commission had been arbitrary in its decision to not allow the ICLU use of the auditorium. The purpose of the ICLU, as stated at 291 N.E. 2d 889 is "the furthering of civil liberties of Indiana residents, as guaranteed by Federal and State Constitutions." Throughout the balance of this opinion there is no discussion of either the ICLU or its stated purpose. The Court merely concludes, at page 890:

". . .Thus, the Commission has interpreted uses not inconsistent with the purpose of the Memorial to be almost any public use. We cannot say such an interpretation is incorrect. However, once a pattern is established and an administrative rule is promulgated, an administrative body such as the Commission has a duty, as an arm of State government, to apply the rule fairly and without discrimination. It is clear that the purpose of the meeting and the purpose of the organization in the case at bar qualify for use of the auditorium under either subsection (b) or (c) of the Commission's own rule. The Commission was therefore arbitrary in its action of denying the ICLU use of the auditorium amounting to a denial of equal protection under Art. 1 §23 of the Constitution of Indiana."

The Commission would submit that the admin-

ative rule under which use of the auditorium

overned has been applied fairly and without

rimination. Burns' Ind. Stat. Ann. §59-1528

ides that the auditorium may be used for public

ings and public purposes not inconsistent with

purpose of the act which establishes the War

rial Commission, upon terms and conditions as

Commission may determine. Since the War Memorial,

stablished by Burns' Ind. Stat. Ann. § 59-1508, is:

" . . . a suitable structure . . . to commemorate the valor and sacrifice of the soldiers, sailors and marines of the United States, and of all others who rendered faithful, loyal, heroic and self-sacrificing service at home and overseas . . ."

it statutorily and logically follows that any use of such structure should be not inconsistent with this commemorative goal.

There was evidence before the Commission and in the briefs to the Supreme Court of Indiana that the ICLU supports the breaking of laws which an individ-ual deems unconstitutional. This resolution on civil disobedience articulates a position that is in clear violation of the purposes of the act which provides that the structure is to be used "in order to inspire patriotism and respect for the law . . . " Burns' Ind. Stat. Ann. § 59-1508. See also Appendix B.

Thus, when the Commission receives an application for use of the auditorium,it must determine if the urposes of the organization or group seeking use of he facilities are <u>not contrary</u> to the goals and deals of the Memorial, the administration of which s entrusted to the Commission. This analysis is equired of all applications and the <u>statute</u> (Burns' nd. Stat. Ann. § 59-1528) compels the Commission to

make that determination. If the purpose of the applying organization is inconsistent with the statutorily stated goals of the Memorial, then that application must be denied.

There was evidence before the Commission and in the briefs to the Supreme Court of Indiana that the ICLU was not the only organization whose application had been denied. Other organizations denied use of the auditorium were the Ku Klux Klan and the Salvation Army. Thus it may be seen that the ICLU has not arbitrarily been denied use of the auditorium.

It should also be emphasized at this time that there was no finding by the Supreme Court of Indiana that the statute which directs the Commission to provide for the use of the Memorial (Burns' Ind. Stat. Ann. § 59-1528) was unconstitutional, nor that the duly promulgated and adopted rule of the Commission (Burns' Ind. Ann. Rules and Regs. [59-1508]-1) was unconstitutional. Instead there was merely a holding that the rule was arbitrarily applied since <u>all</u> groups were not allowed free access to the auditorium. To take the position of the Supreme Court of Indiana would mean that the

Commission would have to abrogate the responsibility delegated to it by the Indiana General Assembly without any finding that such delegation was unconstitutional, thereby requiring the Commission to violate validly enacted Indiana statutes.

The case of Application of Hooker (1955) 143 N.Y.S 2d 750, 208 Misc. 188, supports the position of the Commission. In that case the president of the local chapter of the Nationalist Party applied for use of the fire house auditorium for the purpose of holding a public meeting to be "educational for public interest." The application, submitted on a form provided, was denied by the Fire Department Council. That Council had, by statute, exclusive management and control of the property of the fire district. The court said that because the granting of permission to use the auditorium was discretionary, the court would not interfere with administrative discretion legally exercised, provided it was not done so arbitrarily. The applicant claimed, however, that his right to freedom of speech, assembly and equal

protection of the laws had been violated. The applicant claimed that the auditorium was public property and therefore accessible for public speech and assembly. But the court replied that the fire house premises were primarily dedicated to fire house purposes and not open to the public generally. The Council had the right to withhold the premises altogether from public use, and had the right, if acting fairly, to limit their use to certain public purposes and regulate the time, place and manner of use for purposes unrelated to fire protection. It held there was no constitutional privilege to exercise free speech and assembly in a fire house auditorium and no obligation to let the premises out to the applicant. The action of the Council, in refusing the applicant, was not directed against his right of free speech but was concerned solely with the use of a portion of premises entrusted to the exclusive control of the Council. To applicant's claim that he was denied equal protection of the laws by the discriminatory act of the Council, the court replied that use of the auditorium was limited by duly adopted rules to

"social and recreational purposes" and that it did not appear that the Council had permitted use of the hall under comparable circumstances by groups wishing to hold meetings for "educational" and other purposes. Because of this conflict in purpose, the denial of the application was affirmed.

In Adderly v. State of Florida 385 U.S. 39, 87 S. Ct. 242 (1966) the United States Supreme Court said:

> "(T)he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

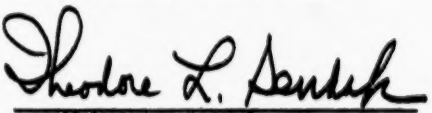
The Commission would assert that it has the right and duty to examine all applications for use of the auditorium, and that the application in this case was properly denied.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the

Supreme Court of Indiana.

Respectfully submitted,



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this ~~2nd~~, day of ~~May~~, 197~~3~~

APPENDIX A

Billie P. McCullough
Clerk Supreme Court and Court of Appeals

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

BILLIE R. McCULLOUGH, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 633-5200

No. 470S89

~~Indiana Civil Liberties Union, Inc.~~, V. Indiana War Memorials Commission.

You are hereby notified that the Indiana Supreme Court

has on this day Denied Appellees Petition for Rehearing. Hunter, Acting, C. J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

EDITORIALS

War Memorial Case File

It's Real

A document has come into our hands which at first we thought was fraudulent. But, since we are now assured by the Indiana Civil Liberties Union that it is authentic, we shall pass it on to our readers.

The ICLU document, intended as an office memo, lists various fund-raising ideas for the organization. Among them are some quite commendable ones which the ICLU might fruitfully pursue. Others are less so.

Probably the most shocking is one suggesting a contest and prize for desecration of the American flag. The contest, in the words of the memo, would "offer a prize for the object or photograph of an object most clearly and flagrantly in violation" of Indiana's anti-flag desecration law.

The memo goes on to say: "ICLU could offer free legal counsel to persons (not corporations) should they win and be prosecuted. An entry fee of ten dollars could be charged and an awards luncheon planned to make the money. The judging panel could include law-enforcement agencies. (This could be repeated with other ridiculous Indiana laws which inhibit First Amendment rights.)"

So there it is. Now that the ICLU has won its fight to meet in the Indiana War Memorial, maybe a flag desecration luncheon will be held there. Another of the ideas is to sell REAL poppies in front of the war memorial, a rather obvious reference to drugs.

As we said, the memo does contain some good ideas, such as an election-day pancake dinner and a booth at the Rockville Covered Bridge Festival. But somehow we can't imagine ICLU's militants in such mundane roles.

APPENDIX B

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO.

INDIANA WAR MEMORIALS COMMISSION,

Petitioner

vs.

INDIANA CIVIL LIBERTIES UNION, INC.,

Respondent

CERTIFICATE OF SERVICE

Comes now Theodore L. Sendak for Indiana War Memorials Commission, Petitioner herein, and hereby certifies that on this 1st day of August, 1973, three (3) copies of Petitioner's "Petition for Writ of Certiorari to the Supreme Court of Indiana" was deposited in the United States Mail, first class, postage prepaid, addressed to the attorney of record as listed below.

Attorney of Record:

Henry J. Price, Esquire
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Indianapolis, Indiana 46204
Attorney for Respondent

Theodore L. Sendak
Attorney General of Indiana
Attorney for Petitioner
Indiana War Memorials
Commission

FILE COPY

Supreme Court, U. S.
FILED
AUG 29 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 73-218

INDIANA WAR MEMORIALS COMMISSION,
PETITIONER,

V.

INDIANA CIVIL LIBERTIES UNION, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

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INDIANAPOLIS, INDIANA
ATTORNEY FOR RESPONDENT

AUGUST 28, 1973

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 73-218

INDIANA WAR MEMORIALS COMMISSION,
PETITIONER,

V.

INDIANA CIVIL LIBERTIES UNION, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

I.

ARGUMENT

A. Petitioner's Petition For Writ of Certiorari Is Out of Time.

An opinion was rendered and judgment entered in the present case on February 1, 1973, by the Supreme Court of Indiana. Subsequent thereto a timely Petition for Rehearing was filed by the petitioner. Said petition was denied by the Supreme

Court of Indiana, and an order so entered, on May 2, 1973. (Appendix A to Petition for Writ of Certiorari)

The petition for writ of certiorari was filed on August 1, 1973, more than ninety days after the entry of the order of the Supreme Court of Indiana denying petitioner's Petition for Rehearing. The period for applying for a writ of certiorari has not been extended by a Justice of this Court.

Therefore, it appears that petitioner's application for a writ of certiorari is out of time. 28 U.S.C. §2101(c). Since this time limitation was prescribed by Congress, such untimely filing of a petition is a jurisdictional defect which precludes this Court from waiving the untimeliness or entertaining the petition. It follows that the petition should be denied for want of jurisdiction. See, e.g., Department of Banking v. Pink, 317 U.S. 264, 268 (1942).

B. This Court Will Not Review State Court Judgments Based Upon Adequate and Independent Non-federal Grounds.

The principal argument advanced by the petitioner as a reason why the writ should be granted may be stated as follows: The Supreme Court of Indiana cannot rest its judgment upon state law, thereby depriving this Court of appellate jurisdiction, since violation of a federal right was asserted before the state courts; therefore, this Court can and should review the judgment of the Supreme Court of Indiana despite the fact that that judgment was based solely upon state law. This argument is totally without merit.

Exactly the same argument was propounded in Wood v. Chesborough, 228 U.S. 672 (1913). Plaintiffs in that case argued that, because they had consistently pleaded constitutional immunities, the jurisdiction of this Court could not be ousted by the action

of the state court in refusing to consider such federal questions and reaching its decision on the basis of local law. They further contended that "if the pleadings or proceedings in the state court present or disclose the assertion of a Federal right . . . this court has jurisdiction to review the decision of the state court, even though that decision is based entirely upon the questions of local law . . ." 228 U.S. at 677. This Court rejected that argument, saying:

> . . . it is well established that if there be Federal and non-Federal grounds and the latter be sufficient to support the judgment of the state court, there can be no review by this court. 228 U.S. at 677.

The Wood case, supra, clearly establishes that petitioner's argument is refuted, and this Court must deny review, if the judgment of the Supreme Court of Indiana was based upon adequate and independent non-federal grounds. As noted in

Wood, this Court has consistently adhered to the self-imposed principle that it will not review state court judgments based upon adequate and independent state grounds. See, also, Murdock v. Memphis, 20 Wall. 590, 636 (1875); Berea College v. Kentucky, 211 U.S. 45 (1908); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); and cases cited therein. This important limitation on this Court's review of state court judgments was summarized by Mr. Justice Jackson:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. * * * The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. Herb v.

Pitcairn, 324 U.S. 117, 125-126 (1945).

Thus, it remains only for this Court to consider two questions: (1) Is the judgment of the Supreme Court of Indiana based upon a non-federal ground? and (2) Is that non-federal ground adequate to support the judgment? If the answers to both these questions are affirmative, this Court should decline review.

There is no question that the judgment of the Supreme Court of Indiana in the present case was based upon Indiana law. The specific holding of that court was that "The Commission was . . . arbitrary in its action of denying the ICLU use of the auditorium amounting to a denial of equal protection under Art. 1 §23 of the Constitution of Indiana." 291 N.E.2d at 890. This is admitted by the petitioner, who, at several points in its petition, notes that the Supreme Court of Indiana based its

unanimous opinion on the state constitution and failed to pass upon the federal constitutional questions before it. (Petition, pp. 6, 7, 8)

"Where the decision of the state court is based solely upon a non-federal ground, but the federal question was properly asserted, the Supreme Court will determine whether the non-federal ground independently and adequately supports the judgment." Stern & Gressman, Supreme Court Practice, 134 (4th ed., 1969). This Court made such a determination in Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1965). The Supreme Court of Indiana had invalidated a city zoning ordinance which was challenged on the grounds that it violated the just compensation requirement of the state constitution as well as the Due Process Clause of the Fourteenth Amendment. In its opinion the Supreme Court of Indiana did not analyze separately the effect of the two

provisions but considered them together; nowhere in the opinion was it suggested that the conclusions reached by the court flowed from the federal rather than the state source. This Court held that even under such circumstances, there was an adequate and independent non-federal basis for the judgment of the highest state court, saying:

> . . . even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. 379 U.S. at 491-492.

If, under such circumstances, it may be said that a non-federal ground independently and adequately supported the judgment, it follows ipso facto that where a judgment for the plaintiff, such as that in the present case, is explicitly based solely upon a state constitutional provision, there is

an adequate and independent state ground as well.

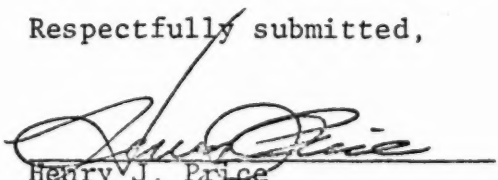
Therefore, it would appear that the judgment of the Supreme Court of Indiana was based upon a non-federal ground and that that ground was adequate to support the judgment. It follows that the petition should be denied for want of a substantial federal question.

II.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,



Henry J. Price
Counsel for Respondent

August 28, 1973

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 73-218

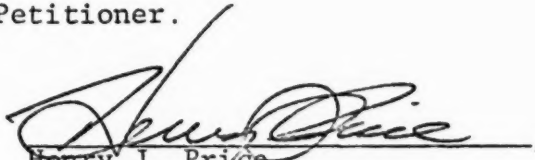
INDIANA WAR MEMORIALS COMMISSION,
PETITIONER,

V.

INDIANA CIVIL LIBERTIES UNION, INC.,
RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 1973, three copies of the Brief for Respondent in Opposition were mailed, postage prepaid, to Theodore L. Sendak, Esq., 219 State House, Indianapolis, Indiana, Counsel for Petitioner.



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